IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 595

LOUIS S. NELSON,
Warden, San Quentin State Prison,
Petitioner,

v.

JOHN EDWARD GEORGE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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SUBJECT INDEX

INDEX OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

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STATEMENT OF THE CASE

In *Peyton v. Rowe*, 391 U.S. 54 (1968), this Court unanimously overruled *McNally v. Hill*, 293 U.S. 131 (1934), and held that a state prisoner serving consecutive sentences imposed by a single state is "in custody" under any one of them for purposes of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3). The present case involves consecutive sentences imposed by California and North Carolina. The sole issue on

the merits is whether the Ninth Circuit was right in holding (A. 56-61) that this difference does not warrant a result contrary to that in *Peyton v. Rowe.*[1]

There is a threshold question, however, of whether or not petitioner has standing here. Respondent challenges only his North Carolina conviction. As respondent's jailer, Warden Nelson was the named respondent below. North Carolina did not seek certiorari from the decision below and has entered no appearance here. Petitioner has no personal stake in the ultimate outcome of this litigation, nor in the immediate question of whether respondent may attack his North Carolina conviction now. Petitioner's rights are not threatened and he cannot assert those of North Carolina. *Tileston v. Ullman,* 318 U.S. 44 (1943); *Heald v. District of Columbia,* 259 U.S. 114 (1922); *Yazoo & Miss. Valley R. Co. v. Jackson Vinegar Co.,* 226 U.S. 217 (1912); *cf. Flast v. Cohen,* 392 U.S. 83, 99 (1968); *Brotherhood of Railway Trainmen v. Baltimore & O. R. Co.,* 331 U.S. 519, 524 (1947). What petitioner really seeks is an advisory opinion, telling the State of California that in some future case, it need not appear and defend a consecutive sentence imposed upon a prisoner then incarcerated in another state. Respondent therefore submits that the writ of certiorari be discharged as improvidently granted. If this Court is of the view that it can reach the merits of this case, respondent submits that it should affirm.

SUMMARY OF ARGUMENT

In *Peyton v. Rowe,* this Court concluded that liberties protected by the Great Writ may well be lost if a hearing is postponed until the prisoner is actually serving the sentence which he claims is invalid. The desirability of an

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[1]Petitioner has never claimed that the application for habeas corpus below was made to the wrong federal court, *cf. Word v. North Carolina,* 406 F.2d 352 (4 Cir. 1969). Accordingly, any objection to the decision below on this ground is waived, and we discuss the matter briefly in an Appendix, *infra.*

early hearing is equally present in this case, and petitioner's claim that a different result flows from consecutive sentences imposed by two states has been found wanting by all of the courts that have considered it.

Under the interstate Agreement on Detainers, it is clear that respondent is "in custody" on both convictions, and there is no "jurisdictional" barrier to a consideration of his claims now.

In an Appendix we consider the question, not raised by petitioner, of whether respondent's claims should be heard by the district court in California or in North Carolina, and show that the decision below was correct on this aspect as well.

ARGUMENT

IN LIGHT OF *PEYTON v. ROWE*, THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT IS PRESENTLY ENTITLED TO CHALLENGE HIS NORTH CAROLINA CONVICTION IN A FEDERAL HABEAS CORPUS PROCEEDING COMMENCED IN CALIFORNIA.

A. Nothing in *Peyton v. Rowe* Suggests that Its Rule Is Not Equally Applicable Here.

In *Peyton v. Rowe, supra,* this Court recalled two historic functions of the Great Writ: Its primary office of post conviction relief on the basis of facts not adequately developed in the original proceedings and its vital role in securing a swift judicial review of alleged unlawful restraints upon liberty, and concluded (391 U.S. at 62-65):

> "[p]ostponement of the adjudication of such issues for years . . . lessens the probability that final disposition of the case will do substantial justice * * * Meaningful factual hearings on alleged constitutional deprivations [should] be conducted before memories and records grow stale * * * Clearly, to the extent McNally postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument of

> resolving fact issues not adequately developed in the original proceedings * * * Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time."

Turning next to the requirement that a prisoner seeking habeas corpus be "in custody," 28 U.S.C. § 2241(c)(3), this Court concluded that the only interpretation of these words consistent with its enlightened approach to the availability of the Great Writ was one

> "which views Rowe and Thacker as being 'in custody' under the aggregate of the consecutive sentences imposed upon them. Under that interpretation they are 'in custody in violation of the Constitution' if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights." 391 U.S. at 64-65.

Petitioner nevertheless argues that respondent is not "in custody"—by which he means "doing time"—on the North Carolina conviction (Pet. Br. 11-13, 23-25). But like Rowe, who "practically speaking . . . is in custody for 50 years or for the aggregate of his 30 and 20 year sentences," 391 U.S. at 64, respondent faces continual confinement for the remainder of the terms imposed by California and North Carolina. Petitioner's argument to which we have just referred has been rejected by the Fourth and Ninth Circuits, *Word v. North Carolina*, 406 F.2d 352, 355 (4 Cir. 1969), followed below (A. 59).[2] These courts concluded that in light of the interstate Agreement on Detainers, *Cal. Penal Code* §§ 1389-1389.5,[3] *North Carolina Gen. Stats.* § 148-89, prisoners such as respondent are "in custody" under both sentences, and as the facts of this case show, the courts were right.

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[2]To the same effect: *Desmond v. United States Board of Parole*, 397 F.2d 386, 389 (1 Cir. 1968), *cert. den.* 393 U.S. 919 (under analogous Section 2255 proceedings); *United States ex rel. Van Scoten v. Pennsylvania*, 404 F.2d 767, 768 (3 Cir. 1968) (dictum).

[3]Printed at pages 3-4 of the Appendix to Petitioner's Brief.

Following respondent's incarceration at San Quentin State Prison, North Carolina filed a detainer on an untried robbery charge (A. 32). Article III(a) of the Detainer Agreement provides that a prisoner against whom a detainer is filed may request temporary release to stand trial on the underlying charge. Article III(e) provides this request is a waiver of extradition to stand trial and to serve any resulting sentence, following completion of the prisoner's sentence in the "sending state" (California). Respondent made such a request and in July, 1966, was released to North Carolina for trial. Thereafter, February 8, 1967, respondent was convicted and sentenced to a consecutive twelve to fifteen year term for armed robbery, A. 35, 56-57; *State v. George*, 271 N.C. 438, 156 S.E.2d 845 (1967). One of the grounds of respondent's attack on his conviction was the failure of North Carolina to try him within the mandatory time period set forth in Article III (A. 8-11, 16-21, 57).[4]

Shortly after respondent's return to San Quentin, North Carolina filed a conviction detainer in order that "custody can be assumed by North Carolina" (A. 34) upon the expiration of his California sentence. This will be a *pro forma* matter, for respondent has waived extradition (Article III(e), *supra*) and the California warden has a mandatory duty "to give over the person of any inmate whenever so required by the operation of the agreement on detainers," *Cal. Penal Code* § 1385.5. In light of the provisions of this interstate compact, the Fourth Circuit correctly held, *Word v. North Carolina, supra*, 406 F.2d at 359:

> "The Virginia warden's authority to detain each of the prisoners is clearly dual. When the authorization of the Virginia commitment is terminated by full sentence or by pardon or parole, the Virginia Warden will continue to detain the prisoner under the authorization of the detainer. The prisoner

[4]The others are an alleged denial of his constitutional right to a speedy trial and the prosecution's use of testimony known to be perjurious (A. 22, 57).

> has no hope of release until both authorizations are ended, for if either is withdrawn or expires, the warden will continue to hold him under the other."

Petitioner would distinguish *Peyton v. Rowe* from this case on the sole ground of a statement in that opinion that (p. 65)

> "at least one class of prisoners will have the opportunity to challenge defective convictions and obtain relief without having to spend unwarranted months or years in prison."

from which he deduces a limitation of that rule to a "class" of prisoners serving consecutive sentences imposed by a single state (Pet. Br. 12-13). Nothing in *Peyton* suggests that this Court attached any significance to consecutive sentences imposed by one state when it concluded (p. 67)

> "We overruled McNally v. Hill and hold that a prisoner serving consecutive sentences is 'in custody' under any one of them for purposes of § 2241(c)(3)."

Petitioner's strained construction of the reference to one class of prisoners ignores its plain meaning. This Court was at pains to point out the inherent delays in the processing of criminal cases and the consequence that prisoners attacking current sentences must unavoidably serve time that "they might properly have enjoyed as free men," 391 U.S. at 64. The distinction drawn was between these prisoners and those who may now challenge a second sentence while properly incarcerated on the first.

B. Answer to Miscellaneous Arguments of Petitioner

Petitioner's assertion that he is not the proper party respondent (Br. 13-16) and that the district court lacks jurisdiction over the State of North Carolina (Br. 17-18) is simply a restatement of the claim that respondent is not in custody under the North Carolina conviction and detainer.[5]

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[5]On the facts of this case, the claim that North Carolina is an absentee party over whom the court has no jurisdiction seems very doubtful. See generally, *McGee v. International Life Ins. Co.*, 335

Since the court, for the reasons shown above, correctly held that respondent is in custody for purposes of habeas corpus under 28 U.S.C. § 2241(c)(3), only a brief reply is required. The district court unquestionably has the power to order respondent's release at the end of his current sentence and to prevent any California official from participating in a scheme to return him to North Carolina. Nothing more is required. Warden Nelson has no obligation to defend the North Carolina conviction, and if North Carolina wishes to avoid this result, it can appear and do so itself.

Equally without merit is the attempt to avoid a meaningful inquiry into respondent's constitutional claims on the basis of an analogy to interstate rendition cases, *e.g.*, *Sweeney v. Woodall*, 344 U.S. 86 (1952) (Pet. Br. 19-21). "Extradition habeas corpus" has long been recognized as a distinctly different proceeding,[6] governed by separate constitutional and statutory provisions, *e.g.*, U.S. Const. Art. 4 § 2, 18 U.S.C. § 3182. As petitioner's authority shows, the permissible scope of inquiry is quite unlike that involving the Great Writ, *Smith v. State of Idaho*, 373 F.2d 149 (9 Cir.), *cert. den.* 388 U.S. 919 (1967), and the facts of *Sweeney v. Woodall, supra*, demonstrate its inapplicability to the case at bar. The petitioner was an escaped felon, recaptured in Ohio, who resisted extradition on the ground of alleged mistreatment by Alabama prison officials. Thus his claim to an audience before the federal court in the district of his capture was (a) a wholly illegitimate attempt to obtain greater rights by escape than he had before (344 U.S. at 89-90), (b) made without the necessary exhaustion of state remedies (*ibid.*) and (c) an attempt to litigate a claim—the propriety of custodial treatment—that petitioner asserts is not

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U.S. 220 (1957); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

[6]See Note, *Extradition Habeas Corpus*, 74 YALE L.J. 87 (1964); Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U. CHI. L. REV. 735 (1954); Note, *The Scope of Habeas Corpus Hearing on Interstate Extradition of Criminals*, 53 YALE L.J. 359 (1944).

cognizable in habeas corpus (Pet. Br. 16). The present case involves the converse of these propositions and *Sweeney v. Woodall* is not in point.

Finally, petitioner urges that the Great Writ be denied here because of alleged "practical difficulties" in its administration (Pet. Br. 21-22).[7] This is simply an attempt to put a price tag on respondent's constitutional rights, *Smith v. Hooey*, 393 U.S. 374, 380 n. 11 (1969). Similar problems have arisen in the past, and Congress has reacted not by abolishing the writ but by redistributing the business of administering it, 28 U.S.C. §§ 2241(d), 2255. It can certainly do so again.

CONCLUSION.

Respondent respectfully submits that the decision below was correct and that this Court should affirm.

Dated: February 21, 1970.

JOHN EDWARD GEORGE

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*Counsel for the Respondent in the Court Below**

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[7]This seems inconsistent with petitioner's claim that the result in *Word v. North Carolina, supra,* is also incorrect (e.g., Pet. Br. 11, 23, 25), for most of the difficulties seen by petitioner would vanish if that case were followed.

*At the time this brief was sent to the printer, respondent was unrepresented by counsel in this Court and an application for the appointment of counsel was pending. The brief was submitted on behalf of respondent by the attorney above named, who served as co-counsel of record in the Court below (see A. 2).

APPENDIX

THE "VENUE" QUESTION

The court below held that the district court in California where respondent is presently confined, is the proper court to hear his claims. The Fourth Circuit has held that a hearing in the district of confinement, where permissible, is infrequently preferable to one held in the district of sentencing, *Word v. North Carolina, supra,* 406 F.2d at 355-61. Although calling attention to this conflict (*e.g.*, Pet. Cert. 7, 9), petitioner has never urged that respondent applied for relief to the wrong district court. Thus while we regard the matter as waived, we briefly address ourselves to it in this Appendix in the event this Court wishes to resolve the conflict now.

The Ninth Circuit believed that the matter was controlled by *Ahrens v. Clark,* 335 U.S. 188 (1948), where this Court held that a prisoner must seek habeas corpus in the district of his confinement. Speaking for the Fourth Circuit, Chief Judge Haynsworth regarded *Ahrens* as being largely the product of congressional disapproval of a Vermont judge inquiring into the circumstances of a Florida prisoner serving a Florida sentence, and concluded that the rationale of *Ahrens* did not require the same result in cases such as the one at bar. We respectfully disagree with Judge Haynsworth's conclusion, for while the rationale of *Ahrens* might not require that a hearing be held in the district of confinement, it does not necessarily follow that such a hearing would be improper.

The *Word* decision is at odds with another aspect of *Ahrens,* congressional disapproval of the transportation of prisoners to attend hearings far distant from their place of incarceration. Judge Haynsworth thought there was an appropriate analogy to proceedings under 28 U.S.C. § 2255, but it seems to us that the movement of federal prisoners within the federal prison system is much less complicated than that, as here, which would require the efforts of the

officials of two states and the United States Marshal's office. In addition to creating problems of transportation and custody, the *Word* result seems unwise as a matter of sound judicial administration. It may very well lead prisoners otherwise content with consecutive sentences to challenge them in the hope of obtaining nothing more than a free trip across the country.

Moreover, the decision in *Word* rests largely on the convenience to officials of the jurisdiction whose judgment is challenged, but the requirement that a prisoner litigate his case in a distant forum may well be a sacrifice of his right to a fair consideration of his claims. The district court must make an initial determination as to the merits of an often inartfully drawn petition for habeas corpus. In close cases and with the prisoner nearby, the court may order an evidentiary hearing to resolve any lingering doubts. But where this would require summoning the prisoner from across the country, such doubts might well be resolved against him.

Word also raises problems of adequate legal representation. There is now no provision for the compensation or deferral of expenses of appointed counsel in indigent habeas corpus cases, and the courts therefore depend upon the voluntary assistance of local members of the bar. The result in *Word* would seem to require the transfer of a prisoner weeks, and perhaps months, in advance of an evidentiary hearing, in order to permit him to confer and develop his case with local counsel. Alternatively, it might be preferable to provide funds for California counsel to accompany the prisoner to the hearing or for North Carolina counsel to visit the prisoner beforehand.

These are but a few of the problems created by *Word;* the contrary decision of the court below will probably create others, and the possible solutions are numerous. *Ahrens v. Clark* ultimately rested on the belief that the task of distributing judicial business among the several district courts is a job for Congress. In the context of the present

case, this is not simply a matter of tradition, but rather, we submit, a recognition that the legislature is better able to canvass all of the potential problems and to adopt solutions to as many of them as possible. Respondent therefore urges that *Ahrens v. Clark* be followed here, and the decision below be affirmed on all grounds.